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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT TACOMA

11                  DAMION THOMAS,

12                  Plaintiff,

13                  v.

14                  HENRI FISCHER,

15                  Defendant.

16                  CASE NO. 2:24-cv-01056-JCC-DWC

17                  REPORT AND RECOMMENDATION

18                  Noting Date: November 22, 2024

19                  Plaintiff Damion Thomas, proceeding *pro se*, filed this civil rights action under 42 U.S.C.  
20                  § 1983. On August 26, 2024, the Court screened Plaintiff's Complaint under 28 U.S.C. § 1915A  
21                  and identified several deficiencies. Dkt. 4. The Court declined to serve the Complaint and  
22                  granted Plaintiff leave to cure the identified deficiencies in amended pleadings. *Id.* After  
23                  receiving an extension of time to prepare and file his amended pleadings, Dkt. 6, Plaintiff filed  
24                  an Amended Complaint on October 24, 2024, Dkt. 7.

25                  Upon review of the Amended Complaint, the Court recommends this action be dismissed  
26                  for failure to state a cognizable claim.

1       **I.      Background**

2           Plaintiff, an inmate currently confined at Coyote Ridge Corrections Center, filed this  
3 action arising out of events occurring at Monroe Correctional Complex (“MCC”) located in  
4 Washington State. Dkt. 7. Plaintiff names MCC Chaplain Henri Fischer as the sole defendant in  
5 this action and alleges that Defendant Fischer engaged in First Amendment retaliation. *Id.* at 3.

6           The dispute between Plaintiff and Defendant Fischer began in February 2021, after  
7 Plaintiff placed an order for religious beads from an authorized dealer. *Id.* at 13. On February 19,  
8 2021, Defendant Fischer informed Plaintiff that his bead order had arrived and the packaging  
9 exceeded the allowable weight. *Id.* at 14. Defendant Fischer allegedly stated he would relinquish  
10 the overweight beads to Plaintiff on the condition that Plaintiff would incur a six-month  
11 restriction on ordering additional religious beads. *Id.* Plaintiff accepted the bead order from  
12 Defendant Fischer but objected to the bead-ordering restriction. *Id.* Plaintiff maintains that this  
13 restriction qualified as punishment that Defendant Fischer was not authorized to impose outside  
14 of MCC’s disciplinary process. *Id.*

15          On May 1, 2021, Plaintiff attempted to place another religious bead order, but Defendant  
16 Fischer allegedly refused to process the bead order. *Id.* So, on May 14, 2021, Plaintiff filed a  
17 grievance complaining about Defendant Fischer’s unauthorized restriction on Plaintiff’s ability  
18 to order religious beads. *Id.* at 14–15. Plaintiff alleges Defendant Fischer then “slow walked”  
19 Plaintiff’s bead order in retaliation for Plaintiff’s grievance. *Id.* at 17. Plaintiff does not state for  
20 how long Defendant Fischer delayed the bead order, but the Resolution Review Report Plaintiff  
21 submitted with the Amended Complaint states that Defendant Fischer processed the bead order  
22 on May 27, 2021. *Id.* at 20. The Report further states that Defendant Fischer “reported he slow  
23 walked the process because he wanted [Plaintiff] to know he was not happy [Plaintiff] did not  
24 follow the previous agreement.” *Id.* at 21.

1 Plaintiff also alleges he filed an “inmate kite” against Defendant Fischer *Id.* at 15. In  
 2 response to Plaintiff’s kite, Defendant Fischer allegedly acknowledged that he was aware of  
 3 Plaintiff’s grievance. *Id.* Plaintiff does not state when he filed the kite against Defendant Fischer  
 4 or when Defendant Fischer responded to the kite. However, the Resolution Review Report  
 5 references an inmate kite filed by Plaintiff on May 1, 2021, in which Plaintiff requested that  
 6 Defendant Fischer process his bead order. *Id.* at 20–21. The Report states Defendant Fischer’s  
 7 response to the kite was as follows: “says the one who took his overweight [b]ead order that was  
 8 previously restricted on the con[dition] that he not order again until august and then Grieved the  
 9 Chaplain who appealed to the mailroom not to force him to pay to return the package.” *Id.* at 21.

10 Based on these allegations, Plaintiff contends Defendant Fischer violated his right to be  
 11 free from First Amendment retaliation when he intentionally delayed Plaintiff’s religious bead  
 12 order because Plaintiff filed a grievance. *Id.* at 4–6.

## 13 II. Screening Standard

14 Under the Prison Litigation Reform Act of 1995, the Court is required to screen  
 15 complaints brought by prisoners seeking relief against a governmental entity or officer or  
 16 employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must “dismiss the  
 17 complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to  
 18 state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant  
 19 who is immune from such relief.” *Id.* at (b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*,  
 20 152 F.3d 1193 (9th Cir. 1998).

21 The Court is required to liberally construe *pro se* documents. *Estelle v. Gamble*, 429 U.S.  
 22 97, 106 (1976). However, even *pro se* pleadings must raise the right to relief beyond the  
 23 speculative level and must provide “more than labels and conclusions, and a formulaic recitation

1 of the elements of a cause of action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555  
 2 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

3 After informing a *pro se* litigant of any pleading deficiencies, a court must generally  
 4 grant leave to file an amended complaint if there is a possibility the pleading deficiencies may be  
 5 cured through amendment. *Ferdik v. Bonzelet*, 963 F.2d 1258, 1261 (9th Cir.1992); *Akhtar v.*  
 6 *Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (“A district court should not dismiss a *pro se*  
 7 complaint without leave to amend unless ‘it is absolutely clear that the deficiencies of the  
 8 complaint could not be cured by amendment.’”) (quoting *Schucker v. Rockwood*, 846 F.2d 1202,  
 9 1203–04 (9th Cir. 1988)). However, once a *pro se* plaintiff has been given leave to amend and  
 10 instructed on how to cure the pleading deficiencies, the Court may properly dismiss an action  
 11 based on deficiencies that remain. *See Swearington v. California Dep’t of Corr. & Rehab.*, 624 F.  
 12 App’x 956, 959 (9th Cir. 2015) (finding the district court did not abuse its discretion in  
 13 dismissing without leave to amend because the plaintiff did not cure the complaint’s deficiencies  
 14 despite the district court’s specific instructions about how to do so); *see also Fid. Fin. Corp. v.*  
 15 *Fed. Home Loan Bank of San Francisco*, 792 F.2d 1432, 1438 (9th Cir. 1986) (“The district  
 16 court’s discretion to deny leave to amend is particularly broad where the court has already given  
 17 the plaintiff an opportunity to amend his complaint.”).

### 18 III. Discussion

19 Upon review of the Amended Complaint, the Court finds Plaintiff’s First Amendment  
 20 retaliation claim remains deficient in two ways: (1) Plaintiff claim is barred by the applicable  
 21 limitations period and (2) Plaintiff has failed to plausibly allege the chilling effect element of his  
 22 retaliation claim. As Plaintiff was advised of these deficiencies and failed to cure, the Court  
 23 recommends this action be dismissed for failure to state a claim.

1           **A. Plaintiff's retaliation claim is time-barred.**

2           The Civil Rights Act of 1871 does not include a provision limiting the time in which a §  
 3 1983 civil rights action must be brought. *Rose v. Rinaldi*, 654 F.2d 546, 547 (9th Cir. 1981). In  
 4 the absence of an explicit statutory limitations period, federal courts look to the law of the forum  
 5 state to determine the limitations period applicable to § 1983 actions.<sup>1</sup> *Montgomery v. West*, No.  
 6 23-15728, 2024 WL 2843637, at \*1 (9th Cir. June 5, 2024). Under Washington law, Plaintiff had  
 7 three years from the date his First Amendment retaliation claim accrued to file a § 1983 action.  
 8 See Wash. Rev. Code § 4.16.080(2); *Rose*, 654 F.2d at 547 (three-year statute of limitations  
 9 applies to § 1983 claims arising in Washington State).

10          While the duration of the limitations period is derived from state law, federal law  
 11 determines when a claim accrues. See *W. Ctr. For Journalism v. Cederquist*, 235 F.3d 1153,  
 12 1156 (9th Cir. 2000); *Norco Construction, Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir.  
 13 1986). A federal claim “accrues when the plaintiff knows or has reason to know of the injury  
 14 which is the basis of the action.” *Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 761–62 (9th  
 15 Cir. 1991) (quotations and citations omitted). “[A]s long as a plaintiff has notice of the wrongful  
 16 conduct, it is not necessary that [they] have knowledge of all the details or all of the persons  
 17 involved in order for [their] cause of action to accrue.” *W. Ctr. For Journalism*, 235 F.3d at 1157  
 18 (quotations and citations omitted).

19          The final step in determining whether a claim is time barred is application of statutory  
 20 and equitable tolling. The Court looks to the law of the forum state to determine whether the time  
 21 for filing a § 1983 action has been tolled. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004).

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<sup>1</sup> Ordinarily, the statute of limitations is affirmative defense raised by an opposing party; even so, may be  
 24 grounds for *sua sponte* dismissal of an *in forma pauperis* complaint where the defense is complete and obvious from  
 the face of the pleadings. See *Franklin v. Murphy*, 745 F.2d 1221, 1228–30 (9th Cir. 1984).

1 Washington law allows for statutory tolling in various circumstances, but none is applicable here.  
 2 *See, e.g.*, Wash. Rev. Code. § 4.16.190 (statute tolled by personal disability including  
 3 confinement in pretrial detention); Wash. Rev. Code. § 4.16.200 (statute tolled by death); Wash.  
 4 Rev. Code. § 4.16.220 (statute tolled as to person in United States military service). Equitable  
 5 tolling is available in Washington “when justice requires.” *Millay v. Cam*, 135 Wash.2d 193, 206  
 6 (1998). “The predicates for equitable tolling are bad faith, deception, or false assurances by the  
 7 defendant and the exercise of diligence by the plaintiff.” *Id.* Washington state courts apply  
 8 equitable tolling “sparingly” and do not permit equitable tolling of claims that are untimely  
 9 because of a plaintiff’s “garden variety” excusable neglect. *State v. Robinson*, 104 Wash.App.  
 10 657, 667 (2001) (internal quotations omitted); *see also Redlin v. United States*, 921 F.3d 1133,  
 11 1140 (9th Cir. 2019) (“The doctrine [of equitable tolling] is not available to avoid the  
 12 consequence of one’s own negligence and does not apply when a late filing is due to claimant’s  
 13 failure to exercise due diligence in preserving his legal rights.”).

14 The Court previously advised Plaintiff that “including key dates in his amended pleadings  
 15 is critical to the viability of Plaintiff’s claim” because “§ 1983 claims filed in the State of  
 16 Washington are subject to a three-year limitations period.” Dkt. 4 at 5 n.1.

17 In his Amended Complaint, Plaintiff alleges Defendant Fischer engaged in unlawful  
 18 retaliation by “slow walking” Plaintiff’s bead order in retaliation for Plaintiff filing a grievance.  
 19 Dkt. 7 at 5. Plaintiff does not specify when the alleged retaliatory “slow walking” occurred, but  
 20 other dates provided in the Amended Complaint, and in documents attached thereto, demonstrate  
 21 Defendant Fischer’s alleged retaliation began in May 2021 and concluded on May 27, 2021.  
 22 First, Plaintiff alleges he placed a bead order on May 1, 2021, and the Resolution Review Report  
 23 submitted with the Amended Complaint states that Plaintiff sent a kite to Defendant Fischer  
 24 about processing Plaintiff’s bead order on that date. *Id.* at 14, 20–21. Next, Plaintiff alleges he

1 filed a grievance on May 14, 2021, about Defendant Fischer’s alleged refusal to process the bead  
 2 order. *Id.* Lastly, the Resolution Review Report states that Defendant Fischer reported processing  
 3 the bead order on May 27, 2021. *Id.* at 20.

4 Given Plaintiff’s allegations and submissions, the Court finds Defendant Fischer’s  
 5 alleged retaliatory “slow walking” of Plaintiff’s bead order concluded on May 27, 2021, and  
 6 Plaintiff’s First Amendment retaliation claim accrued on that date. Thus, the applicable three-  
 7 year limitations period started to run the following day on May 28, 2021. The Court further finds  
 8 Plaintiff has not shown circumstances warranting the application of statutory or equitable tolling.  
 9 As such, the limitation period ran uninterrupted and expired three years later on May 28, 2024,  
 10 which was the last day for Plaintiff to file a timely § 1983 action regarding Defendant Fischer’s  
 11 alleged retaliation.

12 As this action was not filed until July 15, 2024, the Court concludes Plaintiff’s First  
 13 Amendment retaliation claim against Defendant Fischer is untimely and should be dismissed.

14 **B. Plaintiff does not sufficiently allege a chilling effect.**

15 Even if this action was timely filed, Plaintiff has not stated a viable First Amendment  
 16 retaliation claim for another reason: Plaintiff has not shown a chilling effect, which is an  
 17 essential element of his retaliation claim. This element requires that “an official’s acts would  
 18 chill or silence a person of ordinary firmness from future First Amendment activities.” *Rhodes v.*  
 19 *Robinson*, 408 F.3d 559, 568 (9th Cir. 2005). Allegations showing a plaintiff suffered more than  
 20 minimal harm are generally sufficient to demonstrate a chilling effect at the pleading stage. *Id.* at  
 21 567–68 n.11. While more than minimal harm is not a high bar to clear, a plaintiff must still  
 22 allege facts showing they suffered *some* harm or threat of harm from a defendant’s retaliatory  
 23 conduct. *See Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000) (affirming dismissal of First  
 24

1 Amendment retaliation claim where plaintiff did not allege harm resulting from a defendant's  
 2 "alleged delaying actions").

3 To cure this deficiency, the Court instructed Plaintiff to "describe the effect [the alleged  
 4 retaliatory] action had on him and/or how it may have affected someone in his position." Dkt. 5  
 5 at 6. Despite the Court's instruction, Plaintiff does not allege any harm resulting from Defendant  
 6 Fischer alleged "slow walking" of his bead order from May 1 until May 27, 2021. *See* Dkt. 7.  
 7 Plaintiff alleges, at most, that his bead order was delayed; he does not describe any harm suffered  
 8 from the delay or allege that he was prevented from ordering beads beyond this short period.  
 9 Allegations of delay without harm are not sufficient to show a chilling effect. *See Resnick*, 213  
 10 F.3d at 449; *see also Quiroz v. Horel*, 85 F.Supp.3d 1115, 1138 (N.D. Cal. 2015) (finding the  
 11 plaintiff did not provide evidence of a chilling effect when his mail was delayed on three  
 12 occasions, but, each time, the mail was ultimately delivered and the delays were not harmful).  
 13 Beyond his allegations of delay, Plaintiff pleads the existence of a chilling effect in a conclusory  
 14 manner and simply recites this element of his claim. This is also insufficient. *Ashcroft v. Iqbal*,  
 15 556 U.S. 662, 678 (2009) ("Threadbare recitals of the elements of a cause of action, supported by  
 16 mere conclusory statements, do not suffice.").

17 As Plaintiff fails to allege any harm or threats of harm he suffered from Defendant  
 18 Fischer's alleged retaliation, the Court finds he has not pled the existence of a chilling effect and  
 19 has thus failed to state a cognizable retaliation claim.

20 **IV. Conclusion**

21 Due to the uncured deficiencies described above, the undersigned recommends this action  
 22 be dismissed for failure to state a claim.<sup>2</sup>  
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24 <sup>2</sup> Dismissal on the recommended grounds constitutes a "strike" under 28 U.S.C. § 1915(g).

1           Objections to this Report and Recommendation, if any, should be filed with the Clerk not  
2 later than **fourteen (14) days** from the date on which this Report and Recommendation is signed.  
3 Failure to file objections within the specified time may affect your right to appeal. Objections  
4 should be noted for consideration on the District Judge's motions calendar **fourteen (14) days**  
5 from the date they are filed. Responses to objections may be filed by **the day before the noting**  
6 **date**. If no timely objections are filed, the matter will be ready for consideration by the District  
7 Judge on **November 22, 2024**.

8           Dated this 7th day of November, 2024.

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11           David W. Christel  
12           United States Magistrate Judge